Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	
Communications Assistance for Law Enforcement Act	CC Docket No. 97-213

REPLY COMMENTS REGARDING STANDARDS FOR ASSISTANCE CAPABILITY REQUIREMENTS

Louis J. Freeh, Director
Federal Bureau of Investigation

Larry R. Parkinson
General Counsel
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Honorable Janet Reno
Attorney General of the United States

Stephen W. Preston
Deputy Assistant Attorney General

Douglas N. Letter
Appellate Litigation Counsel
Civil Division
U.S. Department of Justice
601 D Street, N.W., Room 9106
Washington, D.C. 20530
(202) 514-3602

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SUMMARY

The Commission's request for public comments on the assistance capability requirements of the Communications Assistance for Law Enforcement Act (CALEA) has produced a voluminous body of comments. The Commission's burden in reviewing these comments and resolving the underlying disputes regarding the scope of CALEA's assistance capability requirements is a considerable one, and the Department of Justice and the FBI appreciate the effort and expertise that the Commission will bring to bear on the task. However, the legal force of the comments opposing the government's rulemaking petition in no way matches their physical weight. When the legal and technical arguments underlying the comments are carefully reviewed, the whole is much less than the sum of the parts.

At a general level, the comments reflect a fundamental misunderstanding of the policies and goals of CALEA. The preeminent concern of CALEA is, as the statute's very name suggests, the need for carriers to provide assistance to law enforcement in the execution of authorized electronic surveillance. The basic goal of CALEA's assistance capability requirements is to ensure that the technical ability of law enforcement to carry out electronic surveillance meets, rather than falls short of, law enforcement's legal authority. The commenters who suggest that law enforcement concerns are of no more than secondary importance for CALEA, or that CALEA should be read in ways that limit the ability of law enforcement to carry out legally authorized surveillance, are disregarding the basic underpinnings of the statutory scheme.

At a more specific level, the comments fail to come to terms with the showing in the government's rulemaking petition regarding the deficiencies in the interim standard. Contrary to the commenters' claims, each of the capabilities missing from the interim standard and requested in the

government's petition is firmly rooted in the language, legislative history, and policies of CALEA, and the failure to provide these capabilities will result in serious injury to the government's ability to enforce state and federal laws through electronic surveillance. The commenters' objections to the individual capabilities at issue in this proceeding reflect both legal errors regarding CALEA and the underlying electronic surveillance statutes and technical errors regarding network capabilities and the operation of the interim standard itself. We discuss these errors in detail in this filing. Once they are understood, it will be clear that the government's petition lies at the heart of CALEA, not (as the commenters suggest) beyond CALEA's outer limits.

The Commission is now being called on to perform a task that is critical to the proper implementation of CALEA. Section 103 of CALEA imposes mandatory assistance capability obligations that must be met by all telecommunications carriers. At the same time, CALEA's "safe harbor" provision means that, absent action by the Commission, industry-promulgated standards effectively replace the underlying statutory requirements of Section 103. Unless the interim standard is adequate to ensure that every carrier that implements it is thereby satisfying its underlying statutory requirements of Section 103 in all of the respects at issue in this proceeding, the interim standard works a pro tanto repeal of Section 103 itself. Congress vested the Commission with authority to act under Section 107(b) of CALEA precisely in order to avoid that result. Only prompt action and rigorous review by the Commission can ensure that the assistance capability requirements of Section 103, and the manifest public interests in law enforcement and personal safety that underlie those requirements, are fully vindicated.

DISCUSSION

The Department of Justice and the FBI submit these reply comments in response to comments filed by other parties on May 20, 1998, regarding the assistance capability requirements of Section 103 of CALEA. The following discussion is divided into three parts. In Part I, we respond to comments concerning the general purpose and scope of CALEA and the nature of the present rulemaking proceeding. In Part II, we respond to comments directed at the specific assistance capabilities addressed in the government's petition and proposed rule. In Part III, we address comments dealing with other assistance capability issues.

I. The Commenters Misunderstand the Policies and Goals of CALEA and the Nature of this Proceeding

A. The Governing Policies and Goals of CALEA

1. This proceeding involves the Communications Assistance for Law Enforcement Act. We begin by underscoring the title of the Act because it reflects a basic truth that many of the commenters prefer to ignore: the obligation of the telecommunications industry to assist law enforcement constitutes the heart of CALEA.

The enactment of CALEA was not sought by the telecommunications industry, nor was it sought by privacy groups. Instead, Congress acted in response to the unanimous requests of federal, state, and local law enforcement agencies for assistance in the execution of lawful electronic surveillance. Congress acted to "insure that law enforcement can continue to conduct authorized wiretaps" in the face of rapid technological changes in the telecommunications industry. H. Rep. No. 103-827, 103d Cong., 2d Sess. 9 (1994) ("House Report"), reprinted in 1994 U.S. Code Cong. & Admin. News ("USCCAN") 3489; Digital Telephony and Law Enforcement Access to Advanced

Telecommunications Technologies and Services: Joint Hearings before the Subcomm. on Technology and the Law, Senate Comm. on the Judiciary, and Subcomm. on Civil and Constitutional Rights, House Comm. on the Judiciary ("Joint Hearings"). 103d Cong., 2d Sess. 109 (Aug. 11, 1994) (statement of Sen. Leahy) (CALEA "will assure law enforcement's ability to conduct court-authorized wiretaps").

To be sure, assisting law enforcement in the performance of authorized electronic surveillance is not the only goal of CALEA. Congress also sought to accommodate other interests, such as the continued development of new communications technologies and the protection of specified privacy interests, and Section 107(b) of CALEA requires the Commission to take account of those interests in framing technical requirements and standards in this proceeding. But while assisting law enforcement is not the only goal of CALEA, it is manifestly the preeminent one. Section 103(a) imposes specific assistance capability obligations on telecommunications carriers that must be met by all equipment, facilities, and services installed or deployed after January 1, 1995. And Section 107(b) mandates that any technical requirements and standards issued by the Commission in this proceeding must "meet the assistance capability requirements of section 103 * * * ." 47 U.S.C. § 1006(b)(1). Law enforcement's need for assistance in the performance of authorized electronic surveillance is thus fundamental to the scope and operation of CALEA, and it must play an equally central role in the Commission's implementation of the statute.

The comments submitted by privacy groups, such as the Center for Democracy and Technology ("CDT") and the Electronic Privacy Information Center ("EPIC"), are particularly notable for their failure to come to terms with this principle. CDT and EPIC make the remarkable assertion that the principal goal of CALEA is to protect privacy, and that law enforcement concerns

are merely secondary. See, e.g., CDT Comments at 15 ("Congress * * * has placed privacy interests in front of law enforcement"); EPIC Comments at 4 ("privacy interests [must be] accorded the highest priority in the implementation of CALEA"). This assertion simply cannot be sustained.

CALEA does contain a number of discrete provisions that were framed in response to privacy concerns, but most of those provisions are simply irrelevant to this proceeding. See, e.g., CALEA § 202 (codified at 18 U.S.C. §§ 2510(1), 2510(12), 2511(4)(b)) (cordless telephones); id. § 203 (codified at 18 U.S.C. § 2510(16)) (radio-based data communications); id. § 204 (codified at 18 U.S.C. § 2511(4)(b)) (spread spectrum radio communications). In contrast, the assistance capability requirements of Section 103, which form the basis for this proceeding, are framed primarily in terms of satisfying law enforcement's need for assistance in the execution of lawful electronic surveillance. Three of the four assistance capability requirements in Section 103 (47 U.S.C. § 1002(a)(1)-(3)) are directed specifically toward facilitating electronic surveillance, and the fourth (47 U.S.C. § 1002(a)(4)) addresses law enforcement needs as well as privacy concerns. The notion that Section 103 is designed principally to further privacy interests simply cannot be reconciled with the terms of the statute.

2. In an effort to limit the scope of the Commission's review of the interim standard, a number of the commenters point to statements in the House Report that urge against "an overbroad interpretation of the [Section 103] requirements" and encourage "industry, law enforcement, and the FCC to narrowly interpret the requirements." House Report at 23, reprinted in 1994 USCCAN at 3503. We have no quarrel with the general proposition that overbroad interpretations of Section 103 should be avoided. But that general proposition is of little assistance in resolving disputes over the specific capabilities at issue in this proceeding.

In particular, it will not do to argue, as various commenters do regarding particular assistance capability issues, that the government's position must be incorrect because it is "broad" or because industry's contrary position is "narrow." Simply labeling a position in conclusory fashion as "broad" or "narrow" does not advance the legal analysis. Something more is required: careful attention to the language and legislative policies of CALEA as they apply to the particular assistance capability in question. In the government's view, when the interim standard is reviewed in this manner, it is demonstrably deficient as a means of ensuring that the assistance capability requirements of Section 103 are met, even when those requirements are construed narrowly.

In a related vein, several commenters argue that the government is trying to undo legislative compromises that Congress incorporated in CALEA. See, e.g., TIA Comments at i, v. The commenters are correct that CALEA reflects legislative compromises. See, e.g., Joint Hearings at 112-14 (statement of FBI Director Freeh). But they are fundamentally mistaken that the government is seeking to undo those compromises.

The compromises reached during the development of CALEA are embodied in the terms of CALEA itself. The government seeks nothing more than the implementation of technical requirements and standards that fully comport with those terms. For reasons set forth in the government's petition, and addressed in further detail in this filing, the government believes that the interim standard falls well short of ensuring that the explicit assistance capability requirements of Section 103 will be met by carriers who adhere to that standard. Congress vested this Commission with authority to act under Section 107(b) precisely because it foresaw that the telecommunications industry might, for a variety of reasons, develop technical standards that do not adequately implement the statutory mandates of Section 103. In asking the Commission to adopt additional

technical requirements and standards, we are seeking to preserve, not upset, the balance struck by Congress.

Moreover, it is important to recognize that the compromises embodied in CALEA run in both directions; while law enforcement yielded ground in some areas during the legislative process, it gained in others. For example, Congress replaced "call setup information" in the original draft legislation with "call-identifying information" in CALEA, and as explained in detail below (see pp. 31-32 infra), the final definition of "call-identifying information" (47 U.S.C. § 1001(2)) is more inclusive than the original definition of "call setup information." It is thus a fundamental distortion of the legislative record for commenters to suggest that Congress acted only to pare back law enforcement's original proposals during the drafting of CALEA, and that the government is now trying to reverse that process in this proceeding.

3. Several commenters argue that the legislative history demonstrates that CALEA is intended to provide law enforcement with the same capability to conduct electronic surveillance that law enforcement traditionally had in the analog POTS environment, and no more. See, e.g., EPIC Comments at 16-18; Americans for Tax Reform ("ATR") Comments at 8, 15, 21. Based on that premise, the commenters argue that the government's petition is facially invalid to the extent that it seeks access to information that the government could not traditionally acquire by monitoring the "local loop" between a subscriber and the subscriber's central office. See, e.g., BellSouth Comments at 8. These comments confuse two fundamentally different issues: the technical capability to engage in electronic surveillance and the legal authority to do so. The failure to distinguish between technical capability and legal authority is one of the most fundamental and pervasive errors made by the commenters in this proceeding.

As noted in the government's petition, the legal authority of federal, state, and local law enforcement agencies to engage in electronic surveillance is governed principally by Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III") and the Electronic Communications Privacy Act of 1986 ("ECPA"). See DOJ/FBI Petition at 6-7; see also Notice of Proposed Rulemaking, In the Matter of Communications Assistance for Law Enforcement Act, CC Docket No. 97-213 (released Oct. 10, 1997), at 4-8. These statutes establish substantive and procedural rules for the interception of wire and electronic communications and the acquisition of related dialing and signaling information. See generally 18 U.S.C. §§ 2510-21, 3121-27.

Section 103 of CALEA, in contrast, is directed at the technical capability of law enforcement to carry out electronic surveillance. It prescribes the obligations of telecommunications carriers to assist law enforcement in acquiring communications and call-identifying information "pursuant to a court order or other lawful authorization." 47 U.S.C. § 1002(a)(1)-(3). Section 103 does not purport to define or alter the scope of the legal authority conferred by Title III and ECPA. It presupposes the existence of legal authorization and directs carriers to provide specified assistance so that law enforcement has the capability to carry out the authorized surveillance.

In arguing that the legislative history of CALEA shows an intention to freeze the traditional surveillance capabilities of law enforcement, the commenters point chiefly to the testimony of FBI Director Freeh. Director Freeh's cited testimony, however, was explicitly directed at the issue of legal authority, not that of surveillance capabilities. Director Freeh testified that "[w]e are not seeking any expansion of the authority Congress gave to law enforcement when the wiretapping law was enacted 25 years ago"; that "[t]he proposed legislation * * * does not alter the Government's authority to conduct court-authorized electronic surveillance and use pen registers or trap and trace

devices"; and that "[w]e are not asking * * * to expand the authority that we have to do wiretapping." Joint Hearings at 6, 7, 10 (emphasis added). It is this testimony to which the House Report on CALEA is referring when it states that "[t]he FBI Director testified that the legislation was intended to preserve the status quo * * * ." House Report at 22, reprinted in 1994 USCCAN at 3502; compare Joint Hearings at 32 (prepared statement of Director Freeh) (proposed legislation "ensures a status quo as it relates to legal authorities" governing electronic surveillance)) (emphasis added).

While Director Freeh's testimony makes clear that CALEA was not intended to alter the general legal authority of law enforcement to conduct electronic surveillance, nothing in his testimony -- or anywhere else in the legislative history -- suggests that Congress meant to freeze or otherwise limit law enforcement's technical capability to perform authorized electronic surveillance. To the contrary, Director Freeh testified that the proposed legislation was intended "to maintain technological capabilities commensurate with existing legal authority" -- to ensure, in other words, that law enforcement's technical capability to perform electronic surveillance would not fall short of its legal authorization to do so. Joint Hearings at 7 (emphasis added); see also id. at 6 ("We simply seek to ensure a failsafe way for law enforcement to conduct court-authorized wiretapping on the recently deployed and emerging technology."). The House Report sounds the same note when it states that CALEA is intended "[t]o insure that law enforcement can continue to conduct authorized wiretaps in the future * * * ." House Report at 9, reprinted in 1994 USCCAN at 3489; see also 140 Cong. Rec. S11055 (Aug. 9, 1994) (Sen. Leahy) (CALEA "will give our law enforcement agencies back the confidence that when they get a wiretap order, they will be able to do their jobs and carry out the order"). The House Report makes clear that CALEA was intended not only to prevent the erosion of existing surveillance capabilities through the introduction of new

technologies, but also to deal with "impediments to authorized wiretaps, like call forwarding, [that] have long existed in the analog environment." Id. at 12, reprinted in 1994 USCCAN at 3492.

The focus of the present rulemaking proceeding is the assistance capability requirements of Section 103 of CALEA, not the underlying legal authorization conferred by Title III and ECPA. The provisions of the government's proposed rule do not purport to alter the boundaries of the government's legal authority to engage in electronic surveillance. Regardless of whether a carrier has the technical capability to provide particular information to law enforcement, law enforcement may not obtain that information unless it has a court order or other sufficient legal authorization. That is true of the TIA interim standard; it is equally true of the standards in the government's proposed rule. As a result, a decision by the Commission to issue the proposed rule, or to modify the terms of the interim standard in some other fashion. will not expand the legal authority of law enforcement to conduct electronic surveillance in any way. To the extent that the commenters suggest otherwise, they are simply and indisputably mistaken.

4. As the foregoing discussion of surveillance capabilities indicates, whether law enforcement traditionally has had the capability to obtain a particular kind of call content or call-identifying information is not dispositive for purposes of this proceeding. The assistance capability obligations of telecommunications carriers under CALEA are specifically defined by Section 103(a). If a particular capability does not come within the scope of Section 103(a), carriers are not legally obligated by CALEA to maintain that capability, regardless of historical practice.[1] But if a particular

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[1] It should be borne in mind, however, that CALEA is only one source of a carrier's legal obligations to assist law enforcement. A carrier has independent assistance obligations that are not superseded or relieved by CALEA. House Report at 20, reprinted in 1994 USCCAN at 3500 ("The assistance capability and capacity requirements of the bill are in addition to the existing necessary (continued...)

capability does come within the scope of Section 103(a), then CALEA obligates carriers to provide it, even if law enforcement did not historically have the technical ability to acquire such information. See DOJ/FBI Petition ¶ 45.

At the same time, law enforcement's traditional capabilities are hardly irrelevant, as some commenters suggest. The principal (although not exclusive) impetus for the enactment of CALEA was the impact of technological changes on the execution of authorized electronic surveillance. See, e.g., House Report at 11-16, reprinted in 1994 USCCAN at 3491-96. Whatever disputes may exist about the purposes underlying CALEA, it cannot seriously be disputed that Congress sought to "ensure that new technologies and services do not hinder [authorized] law enforcement access" to electronic communications. Id. at 16, reprinted in 1994 USCCAN at 3496. The interim standard, however, falls well short of realizing that goal. To the extent that the interim standard deprives law enforcement of the ability to obtain call content and call-identifying information to which it historically has had access, industry should bear a substantial burden to show that the interim standard is not deficient.

B. The Present Proceeding

1. The government's rulemaking petition grows out of the "safe harbor" provisions of Section 107 of CALEA. When an industry association or standard-setting organization issues technical requirements or standards intended "to meet the [assistance capability] requirements of section 103," the industry standards constitute a safe harbor for telecommunications carriers. 47

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[1](...continued)
assistance requirements" in Title 18 and Title 50); see, e.g., 18 U.S.C. 2518(4) (duty to furnish "all information, facilities, and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the [subject's] services"); United States v. New York Telephone Co., 434 U.S. 159, 177 (1977).

U.S.C. 1006(a)(2).[2] If the Commission promulgates standards under Section 107(b), the Commission's standards likewise constitute a safe harbor, one that supersedes any industry standards to the extent that they differ. Ibid. The ultimate question presented to the Commission by the government's rulemaking petition and the other petitions is whether, and how, the Commission should alter the boundaries of the safe harbor created by the industry's interim standard.

For purposes of this proceeding, it is critical for the Commission to bear in mind two points regarding the operation of CALEA's safe harbor provision. The first is that, by virtue of the provision, an industry standard effectively redefines the statutory assistance capability requirements of Section 103 for any carrier that chooses to observe the standard (until and unless the industry standard is revised by the Commission). Under Section 107(a)(2) of CALEA, a carrier that complies with an industry standard "shall be found to be in compliance with the assistance capability requirements under section 103 * * *." 47 U.S.C. 1006(a)(2). Thus, a carrier that meets the industry standard has no other legal obligations under Section 103, unless and until the industry standard is changed by the Commission.[3]

If an industry standard is sufficiently rigorous to ensure that carriers who satisfy it are in fact meeting the assistance capability requirements of Section 103 in all respects, then the integrity of

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[2] In order to provide a safe harbor, industry standards must be "designed in good faith to implement the assistance requirements." House Report at 26, reprinted in 1994 USCCAN at 3506 (emphasis added). If industry standards were a sham or otherwise did not represent a good faith attempt to meet the requirements of Section 103, they would not constitute a safe harbor.

[3] We assume for purposes of this discussion that an industry standard has not been rendered obsolete or incomplete by subsequent technological developments. The issue of whether an industry standard would continue to provide a safe harbor if industry refused to update the standard in response to such developments is not presented here and need not be addressed by the Commission.

the statutory scheme is preserved. But if (or to the extent that) an industry standard does not ensure that carriers will meet the requirements of Section 103, it amounts to a pro tanto repeal of those requirements; it works to excuse carriers from meeting specific legal obligations imposed on them by Congress.

It is therefore imperative for the Commission to scrutinize the adequacy of the interim standard with the greatest possible care. Unless the Commission is satisfied that the interim standard is sufficiently comprehensive to ensure that all carriers covered by the interim standard are meeting their obligations under Section 103 with respect to every capability at issue in this proceeding, the interim standard is deficient and the Commission must act to prevent an impermissible diminution of the statutory requirements of Section 103. By the same token, any standards adopted by the Commission must likewise be sufficient to ensure that all carriers who meet the standard are in fact satisfying all of their underlying statutory obligations under Section 103.

The second point to bear in mind is that no carrier is legally obligated to employ the particular means of satisfying Section 103 that are set forth in the safe-harbor standard, regardless of whether the standard is set by industry or by the Commission. As explained in the government's May 20 comments, the safe harbor mechanism created by Section 107(a)(2) is a voluntary one. If a carrier can satisfy its underlying assistance capability obligations under Section 103 by other means, it is free to do so; failure to use the specific means set forth in the safe-harbor standard does not itself render the carrier's conduct unlawful.[4]

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[4] As explained in the government's May 20 comments, this does not mean that carriers are free to disregard the Commission's conclusions regarding the underlying assistance capability requirements of Section 103 themselves. To the extent that the Commission's standards identify (continued...)

The voluntary character of the safe-harbor standard bears directly on the nature of the Commission's task in this proceeding. Because the specific means prescribed by the safe-harbor standard are voluntary, the Commission need not pursue a "lowest common denominator" approach that attempts to accommodate the potentially differing circumstances of each individual carrier and each platform. If the standards developed by the Commission in this proceeding pose practical problems for carriers using particular equipment or network configurations, those carriers are under no obligation to use the means set forth in the Commission's standards. If they can satisfy their underlying obligations under Section 103 by other means that are better suited to their particular circumstances, they are free to do so. And if compliance with Section 103 is not "reasonably achievable" with respect to particular equipment, facilities, or services, whether for reasons of cost or for other reasons, a carrier is free to seek relief from the Commission under Section 109(b) of CALEA (47 U.S.C. § 1008(b)). The Commission therefore can develop standards that "meet the assistance capability requirements of section 103" (47 U.S.C. § 1006(b)(1)) without having to tailor those standards to the peculiar circumstances of individual carriers and platforms.

2. At this stage of this proceeding, the Commission's principal focus should be on the adequacy of the interim standard, not the particulars of the government's proposed rule. At various points, commenters take issue with one or another detail of the provisions in the proposed rule -- for example, the desirability of a 100-millisecond time stamp in comparison with alternative arrangements. We address many of these comments in the course of the following discussion. But

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[4](...continued)
statutorily required capabilities, carriers must meet those capabilities. See DOJ/FBI Comments ¶¶ 27-28. The particular means of meeting the capabilities, however, are not confined to those specified in the Commission's standards.

arguments directed at the details of the proposed rule are distinct from, and no substitute for, arguments defending the adequacy of the interim standard itself. If the interim standard is deficient, the Commission is obligated to issue new standards that correct the deficiencies.[5] Arguments about how the deficiencies should be corrected, and whether the government's proposed rule represents the most desirable means of doing so, are best left for the round of comments that will follow the issuance of an NPRM.

II. Each of the Capabilities Identified in the Government's Rulemaking Petition Is Included in the Assistance Capability Requirements of Section 103 of CALEA

The government's rulemaking petition identifies a number of specific capabilities that have been omitted from the interim standard but that are, in the government's view, required in order to ensure that carriers will actually satisfy their assistance capability obligations under Section 103 of CALEA. See generally DOJ/FBI Petition ¶¶ 42-105. We now respond to the comments regarding each of these capabilities in turn. At the outset, however, one preliminary point is in order: every one of the capabilities in the government's petition was originally included by industry itself in the initial working draft documents for the industry standard.

Industry circulated its initial draft standards document (PN 3580) in October 1995. The initial drafts included all of the capabilities that are now in dispute. Having originally included each

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[5] US West argues that the Commission need not (and should not) issue corrective standards even if it determines that the interim standard is deficient. See US West Comments at i, 25-27. This argument is entirely incorrect. Section 301 of CALEA provides that "[t]he Commission shall prescribe such rules as are necessary to implement the requirements of" CALEA. 47 U.S.C. § 229(a) (emphasis added). If the interim standard does not meet the assistance capability requirements of Section 103, the Commission therefore must prescribe, by rule, standards that meet those requirements. The factors set forth in Section 107(b), such as cost-effectiveness and impact on residential ratepayers, concern how the assistance capability requirements of Section 103 are to be met, not (as US West suggests) whether they are to be met at all.

of these capabilities, industry subsequently revised the draft standard during the course of the following year to exclude them, pruning hundreds of pages from the standard in the process.

The fact that industry itself originally included these capabilities in its own draft standard makes the tone of disbelief that pervades many industry comments something less than convincing. Although industry repeatedly suggests that there is no legal basis in CALEA for the capabilities requested by the government, industry itself evidently shared law enforcement's interpretation of CALEA at the outset of the standard-setting process. In addition, the fact that industry originally agreed with these capabilities, only to retreat from them later, casts a rather different light on the standard-setting process from the one reflected in the industry comments here. These comments paint a picture of a process in which industry made every reasonable attempt (and then some) to accommodate law enforcement, while law enforcement responded by advancing ever-increasing demands. With respect to the "punch list" items, these comments get the matter exactly backward: far from making concessions, industry retreated dramatically from its own original position, and law enforcement's efforts were directed at bringing industry back to the point where it started. That effort was unsuccessful; this proceeding is the necessary result.

A. Communications of Other Parties in Conference Calls

The first capability at issue is the ability to intercept the communications of all parties in a conference call supported by the subscriber's equipment, facilities, or services. The interim standard only permits law enforcement to intercept those communications that are occurring over the leg of the call to which the subscriber's terminal equipment is actually connected (and hence audible to the intercept subject) at any point in time. See J-STD-025 § 4.5.1; TIA Comments at 31 & n.74. As a result, if other parties to the conference call talk to each other when the subject places them on hold

or drops off the call, the interim standard does not provide access to those communications. Communications between other parties to a conference call may have substantial investigatory and evidentiary value to law enforcement, regardless of whether the subject (who may not even be the person suspected of criminal activity) is "on the line." For reasons outlined in the government's petition, these communications come squarely within the scope of Section 103(a)(1) of CALEA, which obligates carriers to provide law enforcement with "all wire and electronic communications carried by the carrier within a service area to or from equipment, facilities, or services of a subscriber * * * ." 47 U.S.C. § 1002(a)(1); see also House Report at 9, reprinted in 1994 USCCAN at 3489 (CALEA intended to assist law enforcement in intercepting communications "involving * * * features and services such as call forwarding, speed dialing and conference calling") (emphasis added). The omission of these communications therefore renders the interim standard seriously deficient. See DOJ/FBI Petition ¶¶ 46-56.

TIA and other commenters argue that the communications of other parties to a conference call are outside the scope of Section 103(a)(1) when the subject is "off the call." See, e.g., TIA Comments at 31-33; CDT Comments at 39-40. They also argue that Title III does not authorize law enforcement to intercept such communications. See, e.g., TIA Comments at 34-38; Ameritech Comments at 3-5. As we now show, both arguments are incorrect.

1. When a subject establishes a conference call using a call conferencing service provided by the subscriber's carrier, it appears to be undisputed that communications over all legs of the call are "carried by the carrier * * * to or from the equipment, facilities, or services" of the subscriber, and therefore are covered by Section 103(a)(1), as long as the subject is "on the line." TIA asserts, however, that other legs of the call cease to be "carried * * * to or from the [subscriber's] equipment,

facilities, or services" when the subject places other legs on hold or drops off the call. In essence, TIA argues that the conference call no longer uses the subscriber's "equipment, facilities, or services" because the call content of the other legs is not being delivered from the switch to the subscriber's terminal. See TIA Comments at 32-33.

This argument reduces the subscriber's "equipment, facilities, or services" to nothing more than the local loop between the subscriber and the central office. That is, on its face, a wholly inadequate reading of the statutory language. As explained in the government's petition, a subscriber's "facilities" include all of the carrier's network components that support and are identifiable with the services associated with the subscriber's telephone number. See DOJ/FBI Petition ¶ 48 n.10. And the subscriber's "services" are all of the calling features and capabilities that the carrier makes available to the subscriber. A conference call initiated by the subscriber does not cease to use these "facilities" and "services" simply because the subscriber places the other legs of the call on hold or hangs up. If the other legs remain "up," it is only because the subscriber's services are providing that capability. And, needless to say, it is the subscriber who pays the carrier for the call conferencing capability that is being used and who pays any charges associated with the duration of the call itself -- demonstrating in practical terms that the subscriber's services are still involved.

TIA and other commenters argue that when communications between other parties to the conference call are not delivered to the subscriber's terminal, they are not being carried "to or from" the subscriber's equipment, facilities, or services. See, e.g., TIA Comments at 32-33. Here again, the commenters wrongly equate "facilities" and "services" with the subscriber's terminal and local loop. Unlike equipment, services are not physical objects and do not have a specific location. Hence, when the statute speaks of delivering communications "to or from" the subscriber's services,

it is necessarily speaking in functional terms rather than physical or geographic ones: a communication is delivered "to or from" the subscriber's services when the carrier provides the services to carry out the communication. Similarly, communications are "to or from" a subscriber's facilities when those facilities are used to carry the communications. Accordingly, Section 103(a)(1)'s "to or from" language offers no support for the interim standard.[6]

TIA's restrictive reading of Section 103(a)(1) is also at odds with CALEA's coverage of features like call forwarding. It is undisputed that if a subscriber has call forwarding capabilities, Section 103(a)(1) requires the carrier to have the capability to provide law enforcement with the content of forwarded calls. See House Report at 9, reprinted in 1994 USCCAN at 3489. Indeed, the interim standard itself expressly recognizes this requirement. See, e.g., J-STD-025 § 5.4.7 (Redirection message); id. Annex D, § D.11. Yet when a call is forwarded from the subscriber's number to another number, the resulting communication is not delivered to the subscriber's terminal, and the subscriber himself or herself need not be a party to the communication. Under the reading of Section 103(a)(1) advocated by TIA and other commenters, forwarded calls therefore would not be "to or from" the subscriber's equipment, facilities, or services. A reading of the statute that would lead to this result -- a result at odds with Congress's clear intent and the interim standard's own treatment of call forwarding -- is necessarily incomplete.

CDT suggests that Section 103(a)(1) is restricted to "the communications of the subscriber" -- meaning, apparently, communications in which the subscriber is taking part -- and therefore does not

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[6] TIA analogizes the delivery of communications between other conference call parties to the "transiting" of international calls across the United States. Ibid. Comparing the transiting of international calls with the operation of a subscriber's call conferencing services is, to be charitable, an apples-and-oranges comparison.

reach the communications of other parties when the subscriber is not on the line. CDT Petition at 40. This argument is squarely inconsistent with the language of Section 103(a)(1). By its terms, Section 103(a)(1) encompasses "all wire and electronic communications carried by the carrier * * * to or from equipment, facilities, or services of a subscriber * * * ." 47 U.S.C. § 1002(a)(1) (emphasis added). As long as a communication is carried "to or from [a subscriber's] equipment, facilities, or services," the carrier must make it available to law enforcement; the statute does not restrict that obligation to communications in which the subscriber (who, it should be recalled, might not even be a target of the criminal investigation) is participating.[7]

Several commenters suggest that, since law enforcement could not traditionally intercept the "held" portions of a conference call by monitoring the local loop (see DOJ/FBI Petition ¶ 51), such communications are therefore beyond the reach of Section 103(a)(1). See, e.g., AirTouch Comments at 9-10; BellSouth Comments at 8; SBC Comments at 9. As explained above, however, the traditional boundaries of law enforcement's surveillance capabilities are not dispositive. See pp. 10-11 supra. Where, as here, the express language of Section 103(a)(1) covers the communications in question, carriers are obligated to provide those communications, regardless of whether law enforcement could have acquired them through traditional monitoring techniques in the past.

AirTouch asserts that Section 107(b)(1) of CALEA, which calls for the Commission to adopt standards that "meet the assistance capability requirements of section 103 by cost-effective methods"

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[7] CDT quotes a passage in the House Report which states that carriers must "ensure that new technologies and services do not hinder law enforcement access to the communications of a subscriber who is the subject of a court order." House Report at 16, reprinted in 1994 USCCAN at 3496. Nothing in this passage purports to limit the scope of Section 103(a)(1) to cases in which the subscriber is a party to the call, and the plain language of Section 103(a)(1) itself precludes any such limitation.

(47 U.S.C. § 1006(b)(1)), requires the Commission to engage in a cost-benefit analysis to decide "whether the value of the capability * * * outweighs the costs carriers would incur in deploying the capability." AirTouch Comments at 13. This argument is fundamentally misconceived. Section 107(b)(1) merely directs the Commission to select cost-effective means of achieving the assistance capability requirements of Section 103; it does not permit, much less require, the Commission to dispense with those requirements. If Section 103(a)(1) encompasses the "held" portions of a subscriber's conference calls, then carriers are obligated to ensure that their networks can provide that information to law enforcement, absent a carrier-specific showing under Section 109(b) that compliance is not reasonably achievable, and any standards adopted by the Commission must ensure that that obligation is discharged in full.

Finally, several commenters suggest that the ability to monitor all legs of a conference call provided by the subscriber's local exchange carrier would be of little value to law enforcement, even if it were included in the interim standard, because a subject can conduct conference calls through conference bridge services provided by other carriers. See PrimeCo Comments at 10; AirTouch Comments at 14. This argument is misplaced for two reasons. First, the mere possibility that a subject may be able to evade authorized electronic surveillance does not excuse a carrier from its obligation under Section 103 to provide law enforcement with the capability to carry out the surveillance. Second, if a subject uses a conference bridge service provided by another carrier, law enforcement is free to seek a Title III order directed at the provider of the service. As a result, there is no gap in the coverage provided by Section 103.

2. In addition to arguments based on the language of CALEA, many commenters argue that CALEA does not require industry to provide law enforcement with the capability of intercepting

conference calls in their entirety because Title III -- the statute that authorizes interceptions for surveillance purposes -- authorizes law enforcement to intercept conference calls only when the intercept subject is "on the line." As we shall explain, however, Title III contains no such restriction. Accordingly, because CALEA requires that law enforcement be able to intercept "all wire and electronic communications * * * to or from equipment, facilities or services of a subscriber," the CALEA capabilities must include the ability to intercept the "held" portions of conference calls.

As explained in the government's petition, court orders issued under Title III are not directed towards individual people, but towards the telecommunications equipment, facilities, and services under surveillance. DOJ/FBI Petition at ¶ 48. A number of commenters nonetheless contend that law enforcement lacks authority under Title III to intercept the "held" portion of a conference call, either because the "subject is no longer participating in the conversation (see, e.g., EPIC Comments at 23 n.67 (suggesting that law enforcement has "authority to monitor only the *subject's* conversation")), or because a target of the criminal investigation has left the call (see, e.g., CDT Comments at 38 (contending that "the purpose of CALEA was to follow the target")), or both (see BellSouth Comments at 8 (stating that "it is the communications content of the specific target, or subject, of the authorized electronic surveillance which is at issue")). These commenters generally appear to assume, erroneously, that some person targeted or identified by law enforcement in

connection with the wiretap must participate in any conversation that can properly be intercepted.[8] We briefly set forth the correct legal principles here.

A Title III application and order focus upon the nexus between a criminal offense and telecommunications facilities that are likely to lead to information about that offense. Before entering an interception order under Title III, a judge must find that there is probable cause to believe both that "an individual" is committing, or is about to commit, a criminal offense (18 U.S.C. § 2518(3)(a)), and that "the facilities from which * * * communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person." 18 U.S.C. § 2518(3)(d) (emphasis added).[9] Accordingly, an interception order under Title III must specify "the identity of the person, if known, whose communications are to be intercepted" (18 U.S.C. § 2518(4)(a) (emphasis added)), a description of "the type of communication sought to be intercepted, and a statement of the particular offense to which it relates" (18 US.C. § 2518(4)(c)), and "the nature and location of the communications facilities as to which * * * authority to intercept is granted" (18 U.S.C. §

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[8] Some of the commenters' confusion stems from the Interim Standard's definition of a "subject" as "a telecommunications service subscriber whose communications, call-identifying information, or both, have been authorized by a court to be intercepted." J-STD-025 at 1. The Interim Standard's definition is inadequate because, as we explain below, almost all court orders authorize the interception of calls to particular facilities, rather than to particular people. As defined in the Interim Standard, therefore, the term "subject" lacks a referent except in the unusual case of a "roving" wiretap. This Reply Comment uses the definitions of the terms "subscriber" and "subject" set forth in the government's rulemaking petition: a "subscriber" is the person or entity whose equipment, facilities, or services are the subject of an authorized law enforcement surveillance activity, while a "subject" is any person who is using the subscriber's equipment, facilities, or services. DOJ/FBI Pet. ¶ 47; see also id. Appendix 1, at 3 (defining "subject" and "subscriber").

[9] The judge must also find that intercepted communications would concern the offense, and that normal investigative techniques are inadequate. 18 U.S.C. §§ 2518(3)(b) and (c).